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March 7, 1995

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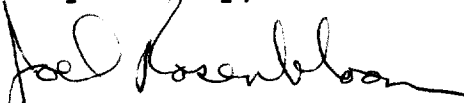
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., enclosed for filing with the Commission are an original and four (4) copies of comments in MM Docket NO. 94-123, Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules.

If there are any questions with respect to this filing, please communicate directly with the undersigned.

Respectfully,


Joel Rosenbloom

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re

Review of the Prime Time
Access Rule, Section 73.658(k)
of the Commission's Rules

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) MM Docket No. 94-123
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To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF CAPITAL CITIES/ABC, INC.

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OFFICE OF SECRETARY

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Access Rule, Section 73.658(k))
of the Commission's Rules)

To: The Commission

COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC"), owner and operator of the ABC Television Network ("ABC"), as well as eight television broadcast stations, responds to the Notice of Proposed Rulemaking released October 25, 1994 in this proceeding, 9 FCC Rcd 6328 (1994) ("Notice"), as follows:

SUMMARY

The Commission has called for "a rigorous economic and policy analysis in this proceeding to assess the extent to which the rule serves the Commission's 'public interest' mandate to maximize consumer welfare, as opposed to merely protecting individual competitors in the communications industry." Notice, 9 FCC Rcd at 6348 ¶ 32. We seek to provide such an analysis in these comments and in An Economic Analysis of the Prime Time Access Rule by Economists Incorporated ("EI Economic Analysis"), prepared and submitted on behalf of ABC, CBS Inc. ("CBS") and National Broadcasting Company ("NBC").

We urge, on the basis of these analyses, that the prime time access rule ("PTAR") should be repealed. The rule cannot reasonably be justified as a means of protecting television program producers, distributors or station outlets against exercises of market power by ABC, CBS and NBC ("the original networks"), because no such power exists. The rule inhibits and distorts competition and injures viewers, advertisers, program producers, networks and stations. Whatever the case may have been when PTAR was adopted a quarter-century ago, these harms to the public interest cannot be justified today by any perceived contribution that PTAR makes to the "diversity" of television services available to the public. A decision to retain PTAR would be arbitrary and capricious. It would also be irreconcilable with the requirements of the First Amendment.

I. PTAR Cannot Be Justified as a Means of Protecting Program Producers, Distributors or Stations Against Exercises of Presumed Market Power by Networks

In 1970, when it concluded that "the networks" were dominant in prime-time program production and distribution, the Commission pointed to the facts that only three national networks existed, that 153 out of 224 commercial television stations in the top 50 television markets were affiliated with one of those networks, and that only 14 of those top markets had one or more VHF independent stations. See Report and Order in Docket No. 12782, 23 F.C.C.2d 382, 385

("1970 Report"), recon., 25 F.C.C.2d 318 (1970).^{1/} The Commission's Notice and the EI Economic Analysis review in detail the dramatic changes that have occurred since 1970 -- the growth of cable television to its present position as the dominant medium through which video programming is received, the reduction of the handicap suffered by UHF stations (in large part due to cable), the explosion in the number of stations not affiliated with any of the original networks, the equally explosive growth of videocassette viewing, and the advent of other new television media such as DBS, MMDS and VDT.

The Notice and the EI Economic Analysis also document the emergence (in consequence of all these changes) of the Fox network, two new television broadcast network ventures, a thriving first-run syndication industry, and a remarkable array of original program services distributed via cable and other new media, which are supported in whole or part by subscription revenues.^{2/} It is manifest, we submit, that no television network can now be said to possess significant "market power" that could be exerted either upstream (with

^{1/} The Commission largely discounted the ability of "the still-struggling UHF independents" (23 F.C.C.2d at 394) to provide program suppliers with viable outlets to the public.

^{2/} See Notice, 9 FCC Rcd at 6336-42; EI Economic Analysis, 7-17.

regard to program suppliers) or downstream (with regard to viewers, advertisers or station outlets).^{3/}

A. No Network Possesses Significant Market Power as a Program Producer or Purchaser

ABC, CBS and NBC today compete for program supply, not only with each other, but with Fox, with the recently launched United Paramount and Warner networks, with independent stations and first-run syndicators and with video program services distributed via cable, VCR and other new media. It is not surprising, given this array of program purchasers and distributors, that no network produces or purchases a sufficient share of video entertainment programming to possess anything like market power. On average, each of the original networks had a 9.4% share of 1994 video entertainment program expenditures and produced in-house programs accounting for 1.9% of such expenditures.^{4/}

There was never any basis, moreover, for vaguely articulated claims about collective network market power or oligopolistic interdependence in program purchasing. And the advent of Fox, other new networks and cable program

^{3/} We use the term "market power" in these comments to denote the "ability to raise prices above those that would be charged in a competitive market." NCAA v. Board of Regents, 468 U.S. 85, 109 n.38 (1984). By "significant" market power, we mean market power of a degree and kind that pose some threat to consumer welfare. Cf. Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1052 (7th Cir. 1992).

^{4/} EI Economic Analysis, 25 & Appendix G, G-2, 128.

services, as well the growth of first-run syndication, make such concerns wholly unrealistic today.^{5/}

We may anticipate claims that many of these new competitors for programming are too new or too limited in their actual or potential audiences to function as effective constraints on the asserted power of the original networks to dictate price to program suppliers. The Commission squarely rejected such claims in its most recent orders in the fin-syn proceeding. It found (i) that "first-run [syndication] increasingly is a fully comparable alternative to network distribution," which does not depend on clearance by network owned or affiliated stations;^{6/} and (ii) that cable television networks likewise offer producers an effective alternative to the original networks.^{7/} It found further that potential competition from new media that have not reached maturity acts as a "powerful check on a network's ability to extract supracompetitive concessions from program suppliers."^{8/} And it pointed out:

^{5/} The Commission rejected such assertions in Tentative Decision and Request for Further Comments, BC Docket No. 82-345, 94 F.C.C.2d 1019, 1063-66 (1983), and again in Second Report and Order, MM Docket No. 90-162, 8 FCC Rcd 3282, 3307-8 ("1993 Fin-Syn Report"), recon., 8 FCC Rcd 8270 (1993) ("1993 Fin-Syn Recon. Order"), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994).

^{6/} 1993 Fin-Syn Report, 8 FCC Rcd at 3306.

^{7/} Id. at 3306-7.

^{8/} 1993 Recon. Order, 8 FCC Rcd at 8287.

Our appropriate regulatory focus . . . is not on whether producers would generally prefer to strike deals with one of the established networks, but rather whether the overall demand for programming in the broadcast and cable marketplace limits a network's ability to control the market or dictate prices for prime time entertainment programs. We concluded that the marketplace does, in fact, place such limits on the networks, and . . . [there is] insufficient evidence to call this conclusion into question.^{9/}

The Commission was plainly right. Cable services, the newest networks and first-run syndication need not be the equivalent of the original networks in all respects in order to constrain the prices those networks must pay for programming. Despite the limited schedule offered by the United Paramount Network ("UPN"), despite its limited affiliate lineup and its heavy reliance on UHF outlets, UPN's first broadcast of "Star Trek/Voyager" attracted a larger number of TV households nationwide than all but one other network program telecast in its time period and a larger number of viewers aged 18 to 49 than any other such program.^{10/} The lessons taught by that event were surely not lost on either program suppliers or networks.

^{9/} Id. at 8286 (footnote omitted).

^{10/} UPN's household rating of 13.0 was second only to the 13.5 rating garnered by CBS. Its 24 share of viewers 18-49 exceeded the 23 share earned by Fox, as well as the 16, 12 and 9 shares of the original networks. Nielsen Television Index, Jan. 16, 1995.

**B. No Network Possesses Significant Market Power
in the Sale of Advertising or the Provision of
Programming to Station Outlets and Viewers**

The absence of significant market power with regard to downstream players is equally clear. None of the original networks has a share of viewing or of national advertising that could conceivably signify the presence of market power. In 1993/94, the average share in prime time for ABC, CBS and NBC was 20.2, and network programs broadcast in all dayparts by stations owned by or affiliated with the original networks (considered collectively) drew a 35 share of total viewing (out of 108 total share points).^{11/} In 1993, on average, each of the original networks had a 14.6% share of national advertising.^{12/}

There is no evidence of collusion or oligopolistic interdependence in the three networks' choice of programs or sale of advertising. And the record of some thirty years during which the lead in prime time ratings has passed from one original network to another (with the third typically lagging badly behind) refutes any suggestion that there has been, or is, anything but the fiercest rivalry among them in their efforts to attract viewers and advertisers.^{13/}

Further, no network enjoys significant market power over station outlets. The alternative programming available

^{11/} EI Economic Analysis, 18-19.

^{12/} Id., 20 & Appendix A, A-10, 72.

^{13/} Id., 6-7.

to stations prevents networks from dictating program choices to affiliates. Indeed, between 1977 and 1994, the original networks were forced to cut their daytime programming back substantially because of their inability to persuade their affiliates to clear programs they had offered.^{14/}

The alternative of affiliation with other networks provides an equally powerful check. The financial rewards of operation as a Fox affiliate are increasingly comparable to those of operation as an affiliate of ABC, CBS or NBC.^{15/} And the result is an unparalleled number of affiliation switches. Since May 1994, some 68 television stations in 37 local markets have changed affiliations.^{16/} This heightened competition for affiliates has caused an increase in network compensation to affiliates on the order of \$200 million or more.^{17/}

These facts rebut any suggestion that affiliates operate at the mercy of their networks. The Notice suggests that "individual stations appear to have a greater inherent need for the benefits of network affiliation (i.e., a ready supply of proven programming) than a network does for an

^{14/} In 1994, the original networks collectively programmed 25 fewer hours per week than they had in 1977. Id., 23 & Appendix D.

^{15/} Id., 53.

^{16/} Id., 15.

^{17/} Id.

individual affiliation."^{18/} That suggestion overlooks the network's need for an effective outlet in substantially all local markets, particularly since the network's ability to offer advertisers full nationwide coverage is a critical advantage in competing against media (such as cable networks) that cannot offer advertisers the same benefit.

It must be borne in mind, moreover, that station outlets are not fungible from the perspective of a network. The quality of affiliate management and its ability to support the network's service with the strongest possible local service are important differentiating factors. As we have shown in another proceeding, the success of each network's prime-time schedule is closely linked to the strength of the lead-in provided by its affiliates' local news programs.^{19/} That contribution by the affiliate to the network/affiliate venture takes on added importance in the context of competition with cable networks that cannot offer a comparable mixture of local and national service. Thus, the affiliate with a dominant position in local news gives its network an advantage that the network will forgo only reluctantly. That affiliate enjoys a correspondingly strong position in dealing with its network.

^{18/} Notice, 9 FCC Rcd at 6354 ¶ 43.

^{19/} See Comments of Capital Cities/ABC, Inc. filed March 23, 1992 in MM Docket No. 82-434 at 13.

In short, networks and affiliates need each other. There is no case for the view that affiliates need Commission protection against presumed network market power.

II. PTAR Causes Substantial Public Harm

Given the absence of significant network market power, the employment of regulatory compulsion to change market outcomes is virtually certain to cause public harm. The central harm caused by PTAR -- a harm from which a wide variety of other harms flow -- is the sweeping restriction it imposes upon the ability of three television broadcast networks to distribute programs and the ability of their affiliated stations to broadcast the programs they desire. That restriction inhibits and distorts competition among broadcast networks and syndicators, among broadcast stations, and between the free broadcasting industry and rival nonbroadcast subscription services. In the process, as we shall show, the rule seriously injures viewers, advertisers, program producers, networks, and affiliated stations.

A. PTAR Inhibits and Distorts Competition

PTAR was designed to, and does, shelter first-run syndicators from the competition that network or off-network programming would otherwise provide in the access period.^{20/} Indeed, PTAR protects some first-run producers against

^{20/} See EI Economic Analysis, 44, 48-50.

competition from others; as construed by the Commission the rule restricts the access-period broadcast of shows produced by networks, even if those programs are distributed by independent syndicators.^{21/} In addition, PTAR shelters Fox affiliates, UPN affiliates, Warner affiliates and wholly independent stations from the competition that affiliates of the original networks would otherwise provide.^{22/}

These are only the most obvious of the injuries to competition caused by PTAR. The rule inhibits competition among ABC, CBS and NBC by imposing a government limit on their demand for programs and on the availabilities they sell to advertisers.^{23/} It confers on Fox an artificial advantage in competing for new prime-time entertainment shows.^{24/} By exempting Fox affiliates from its constraints,

^{21/} See Evaluation of the Syndication and Financial Interest Rule, 6 FCC Rcd 3094, 3146 ¶ 144, recon., 7 FCC Rcd 345 (1991), vacated sub nom. Schurz Communications v. FCC, 982 F.2d 1045 (7th Cir. 1992).

^{22/} There is less competition from such affiliates for off-network programming and also less competition for audience (because of their inability to schedule during the access period the programming they deem most attractive). See EI Economic Analysis at 44-45.

^{23/} See id., 42-43.

^{24/} This advantage arises because the rule forbids top-market affiliates of the original networks to air off-network shows in the access period while allowing them to broadcast off-Fox programs in that period. The syndication rights to off-Fox programs, such as "Married . . . With Children," are thus sold in a market much broader than the market in which off-network shows are sold and are correspondingly more valuable. Fox is able to pay less for network exhibition rights (or to attract higher-budget and higher quality shows) than would otherwise be the case. See

the rule offers station owners artificial incentives to affiliate with Fox.^{25/} By offering Fox substantial inducements to refrain from expanding its regular weekly prime-time schedule beyond its current 15 hours (in order to maintain the exemption of itself and its affiliates from the rule's restraints), PTAR limits the competition that Fox provides for the original networks.^{26/} And, by preventing affiliates of the original networks from maximizing the attractiveness of their prime-time schedules, PTAR impairs the competition that the free television industry as a whole provides for non-broadcast subscription media.^{27/}

These restraints on, and distortions of, competition are inherently undesirable as a matter of public policy. They are directly at odds with the procompetitive policies of the antitrust laws, which the Commission is bound to weigh under the public interest standard of the Communications Act.^{28/} Further, as the Commission has recognized:

Under otherwise competitive conditions, a regulatory framework that limits the ability of some competitors to compete on the same terms as other competitors introduces a bias into the market process. With this

id., 43-44, 46.

^{25/} See id., 46-47.

^{26/} See id., 43-44.

^{27/} Id., 47.

^{28/} See United States v. FCC, 652 F.2d 72, 81-82, 86-88 (D.C. Cir. 1980) (en banc).

bias, success in the marketplace becomes an artifact of regulation rather than an indicator that the successful competitor is meeting consumer demands efficiently.^{29/}

PTAR presents a classic instance of this kind of regulation: It impairs competitive incentives to "meet consumer demands efficiently" and diverts entrepreneurial effort from competition in the marketplace to battles for government favor. These harms to the public interest in competition call, absent adequate justification, for the rule's repeal.

**B. PTAR Causes Substantial Injury to Viewers
Advertisers, Program Producers, Networks
and Stations**

The harms inflicted by PTAR are not merely harms to the competitive process. They are injuries to a wide range of marketplace participants. As shown by the EI Economic Analysis, the PTAR regime caused a deadweight loss: it drove a significant number of viewers away from television altogether, and forced others to view programs other than those they most desired, during the 7:30 - 8:00 p.m. period (EST).^{30/} By any measure, that injury to viewers was substantial.^{31/}

The loss of audience during the 7:30-8:00 p.m. period, which the EI Economic Analysis estimates as 1.25 million TV

^{29/} Report and Order, Gen. Docket No. 87-24, Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd 5299-300 ¶ 4 (1988), aff'd sub nom., United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).

^{30/} See EI Economic Analysis, 32-34.

^{31/} Id., 40-41.

households in 1971/72 and 600-900,000 TV households in 1972/73 and 1976/77,^{32/} inflicts comparable injuries on advertisers and the affected stations. This reduction in the attractiveness of the programming that affiliates of the original networks present continues today.^{33/} And it takes on sharper significance in light of the new competition for viewer attention provided by cable, videocassettes and other new media.

The off-network feature of the rule, moreover, injures the producers of programs for the original networks by sharply reducing demand for off-network performances of their works. The result is to reduce incentives to invest in such programs and to injure the original networks by reducing the quality (or increasing the cost) of their prime-time program supply.^{34/} Once again, the free television industry and its audiences suffer.

In sum, by obstructing normal competitive forces, PTAR directly and indirectly harms viewers, advertisers, program producers, networks and stations. The Commission cannot reasonably perpetuate those harms unless it can find that the rule produces adequate countervailing benefit to the public.

^{32/} Id., 33-34.

^{33/} Id., 33, Table 3.

^{34/} Id., 45-46.

III. The Harms Inflicted by PTAR Are Not Justified by Its Purported "Diversity" Benefits

The original rationale for PTAR was that the rule would promote "source diversity" by removing the "three network funnel" between program producers and viewers for a portion of prime time, thereby promoting the production, distribution and broadcast of programs independent of the network distribution system (as it then existed).^{35/} Current proponents of PTAR argue as well that the rule promotes "outlet diversity" by protecting Fox affiliates, UPN or Warner affiliates and wholly independent stations against competition for viewers and for off-network programs, thereby promoting the viability and competitive vigor of those stations and of the new networks with which they are affiliated.^{36/} Neither rationale provides a tenable basis for a decision to retain the rule.

We address first the claim that the public interest is served by a continuation of "infant industry" protection for stations that compete with affiliates of the original networks. Any argument that an industry which has grown from 62 units to 438 in some twenty-five years is still an

^{35/} See 1970 Report and Order, 23 F.C.C.2d at 396 ¶ 23 & 397 ¶ 25. Nothing in the 1970 Commission orders on this subject suggests a belief that the rule would expand the number of entities producing programs for television broadcast (without regard to their mode of distribution to station outlets). As we discuss below, there is no reason to suppose that the rule has had any such effect.

^{36/} See Notice, ¶¶ 27-29.

infant is implausible on its face.^{37/} Moreover, there is plainly no reason to believe that the 73 VHF independents (including Fox, UPN and Warner affiliates) are in need of Commission protection to ensure their viability or competitive effectiveness. The average financial performance of those stations rivals that of ABC, CBS and NBC affiliates in comparable markets.^{38/}

Nor is there ground for continued protection of UHF independents via PTAR. The "UHF handicap" for such stations has been greatly reduced.^{39/} Claims that they need the help of PTAR to survive, to provide adequate local program services or to function as outlets for new networks fall well short of justifying the rule, in light of the injuries PTAR causes to viewers and others, including original-network UHF affiliates, whose average profitability levels are distinctly lower than theirs.^{40/}

Even if there were justification for Commission protection of some independents, it is far from clear that the kind of protection offered by PTAR is effective or important. In November 1994, off-network shows accounted for only 10% of the prime time programming on independents other than Fox affiliates; first-run syndication accounted for 39% and

^{37/} See EI Economic Analysis, 9-10.

^{38/} See id., 49-50.

^{39/} Id., 9, Appendix C.

^{40/} Id., 54-55, Figure 18.

movies for 34%.^{41/} Even in the access hour, off-network shows constituted only 40% of the programming on Fox affiliates and other independents.^{42/} Programming those stations acquired in full competition with affiliates of the original networks accounted for 60%.^{43/}

At the very least, the burden of proof should lie heavily with those who maintain that twenty-five years of "infant industry" protection is not enough. That burden has not been and, we believe, cannot be carried.

There remains for discussion the "three-network funnel" rationale on which PTAR was originally based. In the absence of market power, there is no such "funnel." An industry in which the very first program broadcast by a start-up network such as UPN outdraws virtually all other network programs cannot be described as subject to "funnels."

Indeed, the three original networks now distribute a distinct minority of all programs on television.^{44/} Program distributors do not need Commission-enforced access to the affiliates of the original networks in order to reach the

^{41/} Id., 50, Figure 15.

^{42/} Id., 19.

^{43/} Id., 56, Figure 19.

^{44/} See id., 25, Appendix F at 2 & Table F-2.

public effectively.^{45/} Program producers who wish to reach the public without dealing with ABC, CBS or NBC can do so via Fox, via UPN, via Warner or first-run syndication, via public television, or via any one of many program services distributed by cable and various new media.^{46/}

To be sure, some distribution channels are more efficient and effective than others; programs that reach the public through those channels are thus more likely to attract greater audiences and produce greater revenues for producers and distributors. But the public interest in "diversity" is not an interest in promoting the wealth of producers or distributors or ensuring that all programs have an equal opportunity to become popular.

It is also not material that nonbroadcast video program services do not now reach roughly 31.5% of television

^{45/} First-run syndicators have traditionally argued that they need access to network affiliates in the top markets in order to make their ventures feasible. But while syndicators (like networks) need access to the top markets, there is no evidence that the viability of first-run syndication depends on access to top-market affiliates of the original networks and considerable evidence to the contrary (in the demonstrated success of first-run syndicated shows in prime time that do not depend on such access).

^{46/} Considerations of this sort led Judge Posner, of the Seventh Circuit, to suggest that the Commission might understandably take the position that "diversity in prime-time television programming, or indeed in over-the-air broadcasting generally, was no longer a value worth promoting." Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1055 (7th Cir. 1992).

households.^{47/} The Commission's diversity concerns do not mandate that diverse services be received or watched, but rather that they be available. And cable is in fact available to some 97% of TV households.^{48/}

It is true that cable and other new media require subscription payments, which some households may not be able to afford. The significance of this factor, however, should not be exaggerated. While cable subscription ratios do increase with annual income, almost half (46%) of the households with annual income below \$10,000 nevertheless subscribe.^{49/} There is, moreover, wide diversity in the sources of the broadcast services available to those who depend solely on over-the-air broadcasting.^{50/} And, as shown above, those viewers are injured by the depressing effects of PTAR on the competitive vigor of the free medium.

In any case, PTAR has done little to expand the number of those who supply prime-time programming. In November 1994, three distributors -- King World, Paramount and Fox --

^{47/} Notice, 9 FCC Rcd at 6358 ¶ 52.

^{48/} See EI Economic Analysis, 8.

^{49/} See id. In 1992, households with annual income below \$10,000 constituted some 14.6% of total households. Statistical Abstract of the United States 1994, 464 (Table No. 706). Thus, the households in this income category that lack cable service are roughly 7.3% of the total.

^{50/} The Commission has noted that even local TV markets so small as to be ranked from 125 to 150 now have an average of six television broadcast signals. Further Notice of Proposed Rule Making, MM Docket No. 91-221, released Jan. 17, 1995, at ¶ 129.

supplied 89% of the syndicated programming carried by affiliates of the original networks during the access period.^{51/} Thus, after twenty-five years, the rule has succeeded in producing only three additional distributors of programming in the 7-11 p.m. period, on stations affiliated with the original networks. PTAR has had negligible effect on the overall number of program distributors whose wares reach the public, through broadcast or other outlets. And there is no reason to believe that PTAR results in a greater number of program producers, particularly since two of the three major producers of first-run shows for the access period are Paramount and Fox, which are major suppliers to ABC, CBS and NBC.^{52/}

One could conceive of an argument for regulation to promote "diversity" if networks were in fact "bottlenecks" between producers and program outlets, with market power that enabled them arbitrarily to control the content available to the public.^{53/} Since no network has such market power, market forces will produce as much "diversity" of sources (and of program content) as the country desires. The effort to alter that result by regulation -- regulation that does not add to, but rather interferes with, unfettered

^{51/} Id., 59-60 & Appendix H at 131, Table H-2.

^{52/} Id., Appendix H at 131.

^{53/} The Commission appears to have assumed that such a condition existed when it adopted PTAR in 1970.

choices in the market -- imposes its own form of arbitrary constraint on the content that the public is able to view. Thus, PTAR's anticompetitive government allocation of time in broadcaster schedules not only harms the welfare of consumers but (as we now show) conflicts with sound First Amendment principles.

IV. PTAR Violates the First Amendment

PTAR plainly invades the First Amendment rights of networks to distribute, and of station licensees to choose, the programs that they wish to exhibit.^{54/} That invasion cannot be ignored on the ground that PTAR was upheld against First Amendment attack in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). Subsequent decisions of the Supreme Court have made clear that the First Amendment rights of broadcasters are entitled to considerably greater weight than the Mt. Mansfield court assumed.

The Second Circuit recognized that PTAR "may well impose a very real restraint on licensees in that they will not be able to choose, for the specified time period, the programs which they might wish" (442 F.2d at 478). It relied heavily, however, on the statement in Red Lion

^{54/} It is well established that the First Amendment protects the "liberty of circulation," as well as the right to publish or broadcast. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 768 (1988); id. at 774 & 777 (White, J., dissenting); Lovell v. Griffin, 303 U.S. 444, 452 (1938). Cf. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993).